89-921

UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

No.

CROWN ROLL LEAF, INC.,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(a) Question Presented for Review

Whether the United States District Court for the District of New Jersey, thereafter affirmed by the United States Court of Appeals for the Third Circuit, abused its discretion when, after Petitioner inadvertently failed to provide a written response to an Information Request from the United States Environmental Protection Agency concerning the handling of admittedly de minimis amounts of hazardous wastes which Petitioner's predecessor generated and which were transported to a Superfund site, it imposed a civil penalty against the Petitioner of $142,000.00.

(b) Parties to the Proceeding

Petitioner, Crown Roll Leaf, Inc.*

Respondent, United States of America

(c) Not Applicable per Rule 33.5

(d) Opinions Delivered Below

Letter Opinion and Order of the Honorable Alfred J. Lechner, Jr., U.S.D.J. as entered on the Docket on April 28, 1989.

Judgment Order before the Honorable Higginbotham, Stapleton, and Scirica, Circuit Judges dated October 12, 1989.

*Universal Lustre Leaf, Inc., is a predecessor corporation which was merged into Crown Roll Leaf, Inc.

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(e) Concise Statement of Grounds for Jurisdiction

The United States Court of Appeals for the Third Circuit, before Judges Higginbotham, Stapleton, and Scirica, entered a Judgment Order affirming the Judgment of the District Court dated April 28, 1989 on October 12, 1989. This Petition for Writ of Certiorari is filed to review said Judgment Order pursuant to Rule 17.1 (a) in that the Federal Court of Appeals has, in affirming the District Court, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of

supervision. In addition, pursuant to Rule 17.1 (c), the Federal Court of Appeals, in affirming the District Court, has decided an important question of federal law which has not been, but should be settled by this Court and has done so in a way which conflicts with related applicable decisions of this Court.

(f) Statutes at Issue

Section 3007 (a) of the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. 6927 (a)

Section 104 (e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. 9604 (e)

(g) Statement of the Case

It is uncontradicted that Petitioner failed to serve written responses to the Information Request served by Respondent in a timely manner. The Information Request required the responsive information on or before May 1, 1986. Assuming then, arguendo, that Petitioner should incur a civil penalty for the reasons set forth in the Letter-Opinion and Order of the District Court, and affirmed by the Federal Court of Appeals, the simple calculation of the penalty imposed is in error.

Respondent sought the imposition of a penalty of $100.00

per day for each day that Petitioner failed to comply with the Information Request. Assuming, again arguendo, that such an amount on a per diem basis is fair and reasonable, the information sought was communicated to Respondent on December 20, 1986. As such, the penalty to be imposed would run from May 2, 1986 through and including December 20, 1986, or a period of 233 days. The calculation in the District Court, and affirmed in the Federal Court of Appeals, indicating non-compliance through June 29, 1988 is plain error, an abuse of discretion, and so far departed from the accepted and usual course of judicial proceedings as to

call for an exercise of this Court's power of discretion.

It is uncontroverted in the transcript of the trial of this matter that on December 20, 1986, Petitioner's representative communicated to Respondent's representative all of the substantive information that was requested and that could have been presented in response to the Information Request. In addition Petitioner's representative advised Respondent's representative as to the specific reasons why Petitioner could not provide other information, as specifically requested by the Information Request.

This factual communication, which is not in dispute in this matter, is the clear point at which any civil penalty imposed would cease under the Acts in question. Both of the applicable Acts, RCRA and CERCLA, and the Information Request itself confirm in their express language that Petitioner's information producing duties were satisfied with the information communicated on December 20, 1986. Indeed, both Petitioner and Respondent themselves conducted their respective positions consistent with this understanding.

Section 3008 (g) of RCRA provides that, "Any person who violates any requirement of this

subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000.00 for each such violation. Each day of violation shall, for purposes of this subsection constitute a separate violation." The "violation" of any "requirement" in this case is the failure to respond to the Information Request in a timely manner.

The Information Request itself states, in pertinent part, "Pursuant to the authority of Section 3007 of RCRA, 42 U.S.C. 6927, and Section 104 of CERCLA, 42 U.S.C. 9604, you are hereby requested to respond to the Information Request set forth in the enclosure to this letter (entitled,

"Information Request Addendum") on the basis of all documents of the Respondent in its possession, custody or control..." The communication by Petitioner's representative to Respondent's representative on December 20, 1986 clearly complied with the directive of the request.

The same argument is equally applicable to the pertinent section of the companion act, CERCLA, "The Court may assess a civil penalty not to exceed $25,000.00 for each day of non-compliance against any person who unreasonably fails to comply with" an Information Request. In fact, the Information Request seeks responsive information for the dual purpose of

both RCRA and CERCLA. However, the effective date of the civil penalty section, 104 (e) of CERCLA, as noted by the trial court, is October 17, 1986. Therefore, the calculation of failure to respond for CERCLA would be from October 17, 1986 through December 20, 1986 for a total of 65 days. Clearly, the response of December 20, 1986 from Petitioner's representative to Respondent's representative was responsive to both RCRA and CERCLA demands for information.

As such, the total penalty days that could be assessed against Petitioner for non-compliance is 298. To assume then that all other aspects

of the District Court's rationale, as affirmed by the Federal Court of Appeals, in imposition of the penalties are correct, the maximum penalty which should have been imposed, assuming all of the finding of facts and conclusions of law were correct, would be $29,800.00. A finding to the contrary in the sum of $142,000.00 is an abuse of discretion and in contradiction to the authority underlying the purpose for the imposition of a civil penalty in this instance.

This Court recognized long ago that civil penalties, while they have their place, should not be imposed for what might otherwise be a

"paperwork" mistake. In United States v. Northern Pacific Railway Company, 242 U.S. 240 (1916), this Court was presented with the question of imposing a civil penalty of $100.00 per day under the Interstate Commerce Commission Act of 1887 for the failure of the defendant carrier to file certain reports concerning hours of work for employees under the Hours-of-Service Act.

The facts of Northern Pacific, as in the instant action, make clear that the failure to "file paperwork" was an "oversight" on the part of the defendant. In that case, as well as the case at bar, the Act had a specific and important purpose, to

protect the public. In Northern Pacific, it was protection from operation of common carriers by employees who were overworked. In the instant action, it is to gain information on the nature of hazardous wastes. In both instances, the civil penalty provision was designed to enforce the "information-gathering necessary to guarantee protection." In both instances, the civil penalty counted each day as a separate or continuing violation.

In both instances, the non-compliance resulted from the defendant's inability to obtain certain information and from a "paperwork" deficiency under the Act.

In both cases, the defendant did make a good-faith effort to supply the requested information.

In delivering the opinion of the Court, Mr. Justice Clarke noted that in Northern Pacific, the defendant was making a good-faith effort to comply with an Act which had a valid purpose. He further indicated that there was a "good-faith belief" that compliance was made. Mr. Justice Clarke concluded that an "honest mistake" should not be the basis to impose a harsh civil penalty. He stated, "...we cannot bring ourselves to think that Congress intended to punish such an innocent mistake or omission with a

penalty of $100.00 a day." Northern Pacific, supra, at page 242.

In the opinion, Justice Clarke noted that, while seeking a $500.00 penalty, the government was not seeking the maximum penalty available of $28,900.00 but that maximums were of no consequence. He indicated that even the $500.00 penalty was, "to be a punishment greatly disproportionate to the offense". Northern Pacific, supra, at page 243. Justice Clarke concluded that, "It is very clear that it is not the purpose of the law under discussion to punish honest mistakes...". Accordingly, this Court denied the imposition of the civil penalty. That decision, and

more importantly, the rationale underlying it, is controlling in the case at bar. The Federal Court of Appeals, in affirming the decision of the District Court, has decided an important question of federal law in conflict with the applicable decisions of this Court.

In the instant action, Petitioner concedes that the Information Request was reasonable and has a valid purpose. Further, it concedes that its response was not timely, however, Petitioner asserts, as was recognized by this Court in Northern Pacific, that it; (a) made a good-faith effort to comply, (b) had a good-faith belief that it did

comply, and (c) ultimately complied in fact, but for providing "paperwork".

A review of the transcript of the trial makes clear that Petitioner, from May through September, 1986, engaged in good-faith attempts to provide the information requested. In fact, on September 25, it had accumulated whatever documents it could and was transmitting them to Respondent. Unfortunately, through an honest mistake on September 25, 1986, Petitioner's counsel, upon receipt of the documentation from Petitioner's comptroller, misunderstood the transmittal note, thinking that

Petitioner's comptroller had sent copies of the documents to Respondent with responses to the Information Request. Likewise, Petitioner's comptroller made the same mistake, thinking the contrary. At any rate, the substantive content of the information, as well as the reason why more information could not be obtained, was communicated some seven weeks later to Respondent's representative. At that point all concerned believed that the communication of information was complete. Had the instant case come on before Justice Clarke, he would have, as in Northern Pacific, recognized the "honest mistake" and

"good-faith belief" that Petitioner was laboring under at that time. Indeed, under the rationale of Northern Pacific, assuming any penalty would have been imposed it would have run from the May 2, 1986 date to September 25, 1986, the date of the "honest mistake" by Petitioner's counsel and comptroller in the transmittal of the information. That would then calculate to 147 days for RCRA penalties at $100.00 per day for a total civil penalty of $14,700.00. (CERCLA penalties were not effective until October 17, 1986). A claim that a writing communicated during litigation some two years later as

being the "cut-off" date for penalty imposition would never be considered. Such a calculation takes a completely arbitrary and irrelevant date, when answers to interrogatories are transmitted, as a cut-off date for imposition of the civil penalty.

Even by the rationale of the District Court, as affirmed by the Federal Court of Appeals. The date cannot be the effective date. The filing of the complaint by the Respondent would make any subsequent date unrelated to the purpose of the Act.

The trial court placed great weight upon the case of United States

v. Charles George Trucking Co., 823 F. 2d 685 (1st Cir. 1987). Aside from the fact that Northern Pacific is the controlling authority from this Court, a look at Charles George Trucking makes clear that its facts are inopposite to the case at bar.

In Charles George Trucking, the defendants, Mr. & Mrs. George, were the owners of a landfill site where EPA was investigating hazardous dumping. In that case, the defendant failed to file a response to the Information Request in a timely manner. They sought extensions of time, but still never responded prior to the litigation.

At the conclusion of the

litigation, the District Court imposed a civil penalty of $20,000.00 each for failure to reply. The distinctions between that case upon which the trial court relied, and the instant action are significant.

Initially, in the Charles George Trucking case, the defendants were the owners of the subject landfill site. They were directly responsible for the conduct that is at the heart of the purpose for the Acts in question. In the case at bar, Petitioner has no connection whatsoever with the conduct which is both at the heart of EPA's investigation and the Acts under which the civil penalties are

imposed.

Petitioner was a successor-in-interest to the actual party involved with the hazardous waste, Universal Lustre Leaf, Inc. Petitioner acquired and merged Universal into it in the 1980's, long after the dumping activity was to have been going on. It is only by the legal concept of vicarious liability that Petitioner is contacted for information. It did not engage in the dumping activity and had no participation in it as did the site owners in Charles George Trucking.

Secondly, in Charles George Trucking, the defendant had complete access to all of the records,

documents, and information necessary to respond to the Information Request. In the instant case, there is no issue that Petitioner had no information at its disposal and had to seek to discover it from its predecessor. That discovery then led to confirmation that the records had been destroyed.

Indeed, the one single piece of information that had any relevance to the investigation by EPA and the Information Request was the Special Waste Manifest. That document was at all times in the possession of Respondent from its own search of records at the site. It was never in the possession of Petitioner to

produce. While Mr. & Mrs. George were in a position to produce this information, Petitioner was not.

Finally, and perhaps most significantly, Mr. & Mrs. George never produced information or responded prior to the filing of the Complaint. In the instant action, Petitioner had in fact produced some paperwork and in fact, did attempt to comply within a few months of the Information Request, long before the Complaint was filed. In the Charles George Trucking case, it was only after litigation that the defendant's took action.

The trial court's reliance on the Charles George Trucking case is

misplaced as the basis to impose the penalty in this action. It is contrary to the controlling rationale of this Court. The trial court relies upon United States v. ITT Continental Baking Corp., 420 U.S. 223 (1975); United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D.S.C. 1988); and United States v. Phelps Dodge Industries, Inc., 589 F. Sup. 1340 (S.D.N.Y. 1984) as further support for the civil penalty imposed upon Petitioner. Each of those cases involve alleged violations of the Federal Trade Commission for price-fixing and monopolies. In those cases, the civil penalties imposed

were the direct result of the defendants violating existing orders directing divestiture or other conduct. In those cases, the civil penalty imposed was in the nature of a contempt or sanction and were designed to counter-balance economic advantages gained by violating said orders. Those cases have no relevance to the penalty provisions of the Acts at issue in this case.

(h) Not Applicable to this Petition

(i) Federal Jurisdiction

The jurisdiction of the District Court in the first instance was based on 28 U.S.C. 1331, 1331, 1345, and 1355, and 42 U.S.C. 6928

(a) and 9628 (a). The jurisdiction of the Federal Court of Appeals rests on 28 U.S.C. 1291.

(j) Jurisdiction of Writ

Pursuant to Rule 17, Petitioner seeks allowance of this Writ of Certiorari to review the Federal Court of Appeals affirmation of the District Court's imposition of a civil penalty which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and due to the important question of the federal law which has not been, but should be, settled by this Court so as to be consistent with other applicable

decisions of this Court.

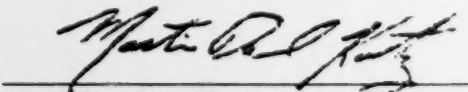
(k) Appendix

(i) Letter-Opinion and Order of the Honorable Alfred J. Lechner, Jr., U.S.D.J.

(ii) Judgment Order before the Honorable Higginbotham, Stapleton, and Scirica, Circuit Judges.

Respectfully submitted,

NUZZO & KATZ, ESQS.



MARTIN DAVID KATZ, ESQ.

DATED: November 28, 1989

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED J. LECHNER, JR.
JUDGE

U.S. POST OFFICE
AND COURTHOUSE
NEWARK, NJ

April 28, 1989

NOT FOR PUBLICATION

LETTER-OPINION AND ORDER
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Re: United States of America v. Crown Roll Leaf, Inc.
Civil Action No. 88-831
Counsel:

Introduction

The Government previously moved for and was granted summary judgment on the issue of liability against defendant Crown Roll Leaf, Inc. ("Crown") for violations of section 3007 (a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. ss 6927 (a), and section 104 (e) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42

U.S.C. ss 9604 (e). Opinion, dated October 20, 1988 (the "October 20 Opinion").

In addition to the pretrial proceedings, the matter was before the court for trial on April 11, 1989 concerning the issue of civil penalties.[1] Both the Government and Crown were given until April 21, 1989 to submit proposed findings of fact and conclusions of law. The

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1 All references to the transcript of the trial are referred to as "Trial Tr. at_____."

additional submissions were necessary because on January 5, 1989 Crown submitted in a one page pretrial memorandum purportedly in compliance with an Order, filed July 18, 1988. The July 18, 1988 Order required the filing by each party of a Final Pretrial Statement. Although neither party completely complied with the requirements of the July 18, 1988 Order, the Government submission was in substantial compliance. The Crown filing, on the other hand, was in substantial derogation of the Order. The failure to comply with the Order is

characteristic of the manner in which both Crown and its counsel responded not only to the litigation but also to the request for information from the United States Environmental Protection Agency ("EPA"), which conduct forms the basis for this action.

The proposed findings of fact and conclusions of law received from Crown cover seven unnumbered pages and are comprised of eight unnumbered paragraphs of proposed findings of fact and twenty numbered proposed conclusions of law. The EPA

submitted sixty-six proposed findings of fact and thirty-nine proposed conclusions of law which total twenty-eight pages. The EPA incorporated by reference in the proposed conclusions of law, those conclusions of law contained in the October 20 Opinion.

Many of the Findings of Fact are substantiated with citations to testimony or documentary evidence or a combination of such authority; such citations are not meant to be exhaustive concerning the Finding. Some of these Findings are based upon the record or inferences from the

record which are not cited. Page or document citations are not set forth to support general findings. See, e.g., Hudson's Bay Co. v. American Legend Co-Op, 651 F. Supp. 819, 823 (D.N.J. 1986); Smithkline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1094-1110 (E.D. Pa. 1976), aff'd, 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978); United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), aff'd, 370 U.S. 294 (1962); United States v. International Boxing Club of N.Y., 150 F. Supp. 397, 401-419 (S.D.N.Y. 1957), aff'd, 358 U.S. 242 (1959).

This opinion constitutes my Findings of Fact and Conclusions of Law. All proposed findings of fact and conclusions of law inconsistent with those set forth herein are rejected in accordance with Rule 52 of the Federal Rules of Civil Procedure.

Findings of Fact

1. The EPA identified more than 600 corporations and individuals who were potentially responsible parties ("PRPs") under the four Cannons Engineering Corporation Superfund sites, two in Massachusetts and two in New Hampshire. EPA identified

these parties using Cannons business records. Universal Lustre Leaf, Inc. ("Universal"), the predecessor of Crown, was one of the companies identified. Trial Tr. at 14-15.

2. EPA notified the PRPs it had identified they were potentially liable by sending each of them a notice letter in March 1986. The notice letters included an Information Request. Trial Tr. at 15, Government Exhibit 1.

3. On March 28, 1986, EPA sent Crown an Information Request, pursuant to section 3007 (a) of RCRA, 42 U.S.C. ss 6927 (a), and section

104 (e) of CERCLA, 42 U.S.C. ss 9604 (e). Government Exhibit 1.

4. The Information Request of March 28, 1986 requested written responses to questions and the production of documents concerning Universal's generation, handling and disposal of hazardous waste and hazardous substances, and Universal's transactions with a number of individuals and companies involved with waste disposal practices at four Superfund hazardous waste sites. Government Exhibit 1.

5. The Information Request asked for written answers to six itemized

questions and for an affidavit attesting to the accuracy and completeness of the responses and that a diligent effort was made to gather documents and interview present and former employees. Government Exhibit 1,[2] at pp. 3-8; Trial Tr. at 62-64.

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2 Government Exhibit 1 consists of a notice letter and an Information Request which were sent jointly, but which are separately paginated. Except where otherwise noted, page references to Government Exhbit 1 refer to the Information Request portion of the exhibit, page 1 of which is headed "Information Addendum." The Information Addendum follows page 7 of the notice letter portion of the exhibit.

6. The Information Request warned that the failure to respond may subject Crown to civil penalties under section 3008 of RCRA, 42 U.S.C. ss 6928, of up to $25,000 for each day of continued non-compliance. Government Exhibit 1, at p.1; Trial Tr. at 61.

7. The March 28, 1986 Information Request was signed and authorized by Merrill S. Hohman, Waste Management Division, EPA Region I. Government Exhibit 1, at p.6 (of the notice letter portion); Government Exhibit 12, at p.5 (Request for Admissions no. 5).

8. On March 28, 1986, Merrill S. Hohman was a duly designated employee and representative of EPA, designated by the Administrator of EPA for the purposes of requesting information under RCRA. The Information Request sought information for the purposes of enforcing RCRA. Government Exhibits 1 and 2; Government Exhibit 12 at pp. 5-6 (Requests for Admissions nos. 6-7).

9. On March 28, 1986, Merrill S. Hohman, Director of the Waste Management Division was an officer, employee or representative of the President to whom the authority to

issue information requests under section 104 (e) of CERCLA, 42 U.S.C. ss 9604 (e), had been delegated. The Information Request sought information for the purposes of enforcing CERCLA. Government Exhibits 1 and 3; Government Exhibit 12 at pp. 6-7 (Requests for Admissions nos. 10-11.

10. EPA sought information to develop its liability case against individual parties and to assist in the development of allocations for negotiation and litigation preparation. Trial Tr. at 15.

11. Crown received the Information

Request of March 28, 1986 on April 1, 1986. Answer 12; 6; Trial Tr. at 15.

12. The Information Request required a complete response within thirty days of receipt. A response was due from Crown on May 1, 1986. Government Exhibit 1, at page 1; Trial Tr. at 61.

13. EPA sent out more than 670 Information Requests to PRPs identified in the Cannons Engineering matter and received 651 responses. Trial Tr. at 40.

14. EPA hired Techlaw, Inc., ("Techlaw") to establish and maintain

a system to mail out the information requests, to track the receipt of the information requests by the PRPs (the information requests were mailed return receipt requested) and to track the submission of the information requests to EPA by the PRPs. Trial Tr. at 36-39.

15. Techlaw maintained a post office box to which the responses to the Information Requests were to be sent. Trial Tr. at 38; Government Exhibit 1, at p.1.

16. Techlaw tracked the return of postal receipt green cards which indicated when PRPs received

information requests. Trial Tr. at 37-38.

17. When responses to the information requests were received, Techlaw date-stamped them and entered the date into the tracking system. Techlaw placed the original in its files and sent a copy to EPA. Techlaw maintained a separate file for each PRP. Trial Tr. at 38.

18. Techlaw sent reports to EPA as to which PRPs had answered the information requests, first on a weekly basis and then on a bimonthly basis. Trial Tr. at 16-17, 38-39.

19. EPA used the information and

documents received in response to the information requests to verify existing information, to identify whether new information had been submitted and to prepare a waste-in list, which is a summary of the hazardous substances sent by various PRPs to the Cannons sites. Trial Tr. at 17-18.

20. Using the waste-in list which it had compiled, EPA was able to negotiate a settlement with 300 de minimis parties, under which they paid approximately $13.5 million. The waste-in list was used to identify which parties were eligible

for de minimis treatment by determining which parties had shipped waste minimal in terms of toxicity and volume. Trial Tr. at 18-19.

21. The waste-in list was also used to identify the major contributors of waste to the site. Trial Tr. at 29.

22. EPA was able to negotiate a settlement with approximately fifty major contributors of hazardous substance under which they would pay approximately $18 million in cash, and perform cleanup work at an estimated value of $16 million. Trial Tr. at 19.

23. Crown was ineligible for any of

these settlements because it had failed to respond to the Information Request; EPA was unable to verify the volume and toxicity of the hazardous substances which Universal sent to the Cannons sites. Other PRPs which had responded to the Information Request had provided information to EPA which was not in the Cannons records. Trial Tr. at 27, 32.

24. Without an accurate waste-in list, it would have been much more difficult for EPA to negotiate settlements because the PRPs would not have confidence in the allocation. Trial Tr. at 19-20.

25. EPA could not have prepared an accurate waste-in list if more parties had failed to respond to the Information Requests. Trial Tr. at 20.

26. Crown did not submit a written response to the Information Request prior to the filing of this action on February 16, 1988. Government Exhibit 12, at pp. 7, 11-12 (Requests for Admission Nos. 15, 33).

27. Crown did not submit any documents to EPA in response to the Information Request prior to the filing of this action. Government Exhibit 12, at pp. 8, 11 (Requests

for Nos. 17, 32).

28. No representative of Crown communicated orally with any representative of EPA concerning the Information Request prior to December 1986. Government Exhibit 12,at pp. 8, 11 (Request for Admission Nos. 16, 31).

29. Vincent DiFiore, Crown's comptroller, directed an effort to gather documents in response to the Information Request. Mr.DiFiore only began this effort during a three week period in either July or August 1986, several months after May 1, 1986, when a response was due Trial Tr. at

45, 61-62, 67.

30. Mr. DiFiore did not read the Information Request. Trial Tr. at 43.

31. On August 18, 1986, EPA sent a reminder letter to Universal, in care of Robert M. Waitts, president of Crown, stating that EPA had not received Crown's or Universal's response to the Information Request of March 28, 1986 and requesting that Crown respond. Government Exhibit 4; Government Exhibit 12, at p.8 (Request for Admission no. 18).

32. Crown received the reminder letter of August 18, 1986 on August

26, 1986. Government Exhibit no. 12, at p. 9 (Request for Admission no. 22).

33. Crown did not respond to the August 18, 1986 reminder letter. Government Exhibit 12, at p. 9 (Request for Admission no. 23).

34. In September 1986, Mr. DiFiore forwarded documents which he had found to Joseph C. Nuzzo, Crown's attorney. Trial Tr. at 55-56.

35. Mr. DiFiore did not send these documents anywhere but to Mr. Nuzzo. Trial Tr. at 65.

36. Mr. DiFiore did not prepare a cover letter to go with the documents

he sent to Mr. Nuzzo. Mr. DiFiore did forward a note, however, to Mr. Nuzzo along with the documents. DiFiore, Tr. at 64-65.

37. Neither Mr. DiFiore nor anyone else at Crown prepared an affidavit describing the completeness of Crown's response and identifying the persons with knowledge about Universal's waste handling, as was requested in the Information Request. Trial Tr. at 63-64.

38. Neither Mr. DiFiore nor anyone else at Crown prepared written response to the questions in the Information Request. Trial Tr. at

65-67.

39. Mr. DiFiore never checked with Mr. Nuzzo to find out whether Mr. Nuzzo sent the document on to anyone else. Trial Tr. at 65.

40. Mr. Nuzzo has been Crown's attorney since 1971 when the company was incorporated and has represented Crown continuously since that time. On behalf of Crown, Mr. Nuzzo handles local litigation and administers litigation files which are in other parts of the country. Mr. Nuzzo also negotiates contracts and handles labor matters on behalf of Crown. Trial Tr. at 73-74.

41. Mr. Nuzzo has weekly meetings at Crown at well as communications with Crown officers one or more times a week. Trial Tr. at 75, 80.

42. Although he is not an officer, director or shareholder of Crown, Mr. Nuzzo acts as corporation counsel for the company and is a representative of the company. Trial Tr. at 71 (Statements of Crown's trial counsel, Mr. Katz).

43. Mr. Nuzzo read the information request when it was received by Crown in April, 1986. Trial Tr. at 95.

44. Mr. Nuzzo received some documents from Mr. DiFiore on

September 25, 1986. Trial Tr. at 81.

45. Mr. Nuzzo stated that prior to September 1986, Crown had no contact with EPA. Trial Tr. at 93.

46. When Mr. Nuzzo received the documents from Mr. DiFiore, there was no cover letter or any indication where Mr. DiFiore had sent the documents. Trial Tr. at 93-94.

47. Mr. Nuzzo did not compare the documents which he received from Mr. DiFiore with the requirements of the Information Request. Trial Tr. at 94-95.

48. Mr. Nuzzo did not prepare an affidavit or any response to the

questions in the Information Request. Trial Tr. at 95-96.

49. Mr. Nuzzo did not see any affidavit or written responses in the package of documents which he received from Mr. DiFiore. Trial Tr. at 97.

50. Mr. Nuzzo did not check with Mr. DiFiore as to whether the documents had been sent to EPA, nor did he send the documents to EPA himself. Trial Tr. at 81, 97.

51. On November 14, 1986, EPA sent an Administrative Complaint, an Order and Proposed Consent Agreement under section 3008 of RCRA, 42 U.S.C. ss

6928, to Universal, in care of Robert Waitts, president of Crown. Government Exhibit 5; Government Exhibit 12, at pp. 9-10 (Requests for Admission nos.. 24, 25).

52. The Order directed that the information and documents previously requested by EPA to be provided. The proposed Consent Agreement required Crown to pay a penalty in settlement of the Government claims for failure to respond to the Information Request. The Administrative Complaint notified Crown it could contest liability by submitting an answer to the administrative

complaint. Government Exhibit 5; Government Exhibit 12, at 10 (Request for Admission no. 25).

53. Crown received the Order. Administrative Complaint and proposed Consent Agreement. Government Exhibit 12, at p.11 (Request for Admission no. 29).

54. Crown did not respond in writing to the Order and Administrative Complaint before the filing of this action. Government Exhibit 12, at p. 11 (Request for Admission no. 30).

55. The only response of Crown to EPA concerning the Information

Request, the reminder letter, the Order, and the Administrative Complaint was a phone call between Mr. Nuzzo and Jeremy Firestone, an EPA attorney, in December 1986. Government Exhibit 12, at p. 11 (Request for Admission no. 31); Trial Tr. at 82. The phone call occurred after Crown received the Order.

56. Mr. Nuzzo testified he told Mr. Firestone Crown would continue to search for documents. Trial Tr. at 84. However, Mr. DiFiore testified that after September 1986, Crown and its employees basically ceased its activity in searching for information

and documents. Trial Tr. at 70.

57. Considering the Information Request was detailed and sought written responses, documents and affidavits, and considering EPA through Techlaw maintained an elaborate tracking system to record the written responses and documents received from more than 600 PRPs, Mr. Nuzzo's testimony that the response to the Information Request was being handled informally with EPA through a telephone call to Mr. Firestone is not credible.

58. Even if Mr. Nuzzo's account of his conversation with Mr. Firestone

were accepted, it is important to note that Mr. Nuzzo did not testify Mr. Firestone told him Crown had complied with the Information Request. Mr. Nuzzo did not testify Mr. Firestone told him Crown did not have to submit to EPA an affidavit and written responses to the questions in the Information Request, as well as documents. Mr. Nuzzo did not testify Mr. Firestone had told him Crown would not be subject to civil penalties for its past and continuing failure to respond to the Information Request. All that Mr. Nuzzo offered was that

Mr. Firestone did not mention these matters in their conversation.

59. Prior to Mr. Nuzzo's conversation with Mr. Firestone, Crown had already been put on notice by the Information Request itself that Crown was obliged to respond to questions in writing and to submit an affidavit concerning the completeness of its investigation and the identity of the persons interviewed, as well as to submit documents. Government Exhibit 1. Mr. Nuzzo did not testify Mr. Firestone told him these instructions were no longer in effect. Rather, Mr. Nuzzo testified

Mr Firestone simply did not mention them. Trial Tr. at 85.

60. The Information Request also put Crown on notice that failure to respond in a timely or complete fashion may subject Crown to civil penalties. Government Exhibit 1. Mr. Nuzzo did not testify Mr. Firestone told him that EPA would not seek civil penalties. Mr. Nuzzo stated only that Firestone did not discuss any further action. Trial Tr. at 86.

61. Also prior to Mr. Nuzzo's conversation with Mr. Firestone, Crown had already been put on notice

of its procedural rights by the cover letter to the Order of November 14, 1986, which Crown had received. Government Exhibit 5, at p.1.

62. Prior to filing the action, the Government gave notice of its intent to file to the States of Massachusetts, New Hampshire and New Jersey. Government Exhibit 8.

63. Following the filing of this action, the Government served a set of interrogatories and requests for production of documents on Crown on May 13, 1988. These interrogatories and document requests substantially incorporated the questions in the

Information Request. Government Exhibit 14.

64. Pursuant to the June 24, 1988 discovery Order of Magistrate Ronald J. Hedges, Crown provided the Government on June 29, 1988 with the information and documents requested both in the interrogatories and documents requests and in the original Information Request. Government Exhibits 14 and 19.

65. One of the documents produced in response to Government interrogatories and document requests was an SCA Survey of Universal's waste. This SCA Survey identified

Universal's waste as containing the hazardous substances: Methyl ethyl ketone, methyl isobutyl ketone, xylene, toluene and ethyl acetate. Government Exhibits 11 and 19; Government Exhibit 13 (Requests for Admissions nos. 8, 12-13). This information concerning the contents of Universal's waste had not been previously available to EPA.

66. Crown had a sales volume of between $11 and $12 million in 1986 and a net worth of $1.6 million. This information accurately reflects Crown's financial condition. Government Exhibit 9; Government

Exhibit 12, at p. 18-19 (Requests for Admission nos. 61-62).

Conclusion of Law

Conclusions of Law made in the October 20, 1988 Opinion are incorporated herein by reference.

1. This Court has jurisdiction over the RCRA claim in this action under 28 U.S.C. ss ss 1331, 1345, 1355 and 42 U.S.C. ss 6928(a). Venue lies in this district for the RCRA claim pursuant to 28 U.S.C. ss 1391 and 42 U.S.C. ss 6928(a). Prior notice of commencement of this action was given to the States of Massachusetts, New Hampshire and New Jersey. Answer

3; Plaintiff's Exhibit 8.

2. This Court has previously ruled that Crown violated section 3007 of RCRA, 42 U.S.C. ss 6927, by failing to respond to EPA's Information Request. October 20, 1988 Opinion. The period of Crown's violation lasted 790 days from May 1, 1986, the date when Crown's response to the Information Request was due until June 29, 1988, when Crown submitted its written responses and documents to the United States, pursuant to Magistrate Hedges' Order.

3. Section 3008 (g) of RCRA, 42 U.S.C. ss 6928 (g), provides that:

> any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of violation shall, for purposes of this subsection, constitute a separate violation.

4. The civil penalty provisions of section 3008 (g) of RCRA, 42 U.S.C. ss 6928 (g), apply to the failure to respond to an EPA Information Request issued under section 3007 (a) of RCRA, 42 U.S.C. ss 6927 (a), as well as to other violations of RCRA. United States v. Charles George Trucking Co., 823 F.2d 685, 688 (1st Cir. 1987).

5. An award may be made in an amount up to $19,750,000 for Crown's 790 days for violation of RCRA.

6. This Court has jurisdiction over the CERCLA claim in this action under 28 U.S.C. ss ss 1331, 1345, 1355 and 42 U.S.C. ss 9613(b). Venue lies in this district for the CERCLA claim pursuant to 28 U.S.C. ss 1391, and 42 U.S.C. ss 9613(b). Answer 3.

7. This Court has previously ruled that Crown violated section 104(e) of the CERCLA, 42 U.S.C. ss 9604(e), by failing to respond to EPA's information request. October 20,

1988 Opinion. The period of Crown's violation lasted 790 days from May 1, 1986, the date when Crown's response to the Information Request was due until June 29, 1988, when Crown submitted its written responses and documents to the United States, pursuant to Magistrate Hedges' Order.

8. Section 104(e) was amended on October 17, 1986 by the Superfund Amendments and Reauthorization Act. As part of those amendments, section 104(e)(5) was added to the statute. Section 104(e)(5), 42 U.S.C. ss 9604(e)(5), provides in pertinent part: "[t]he court may assess a

civil penalty not to exceed $25,000 for each day of non-compliance against any person who unreasonably fails to comply with" an EPA Information Request.

9. Crown unreasonably failed to comply with the EPA Information Request. This Court has previously ruled that the Information Request by EPA was reasonable and the information requested was consistent with the legislative purposes of RCRA and CERCLA. October 20, 1988 Opinion, at pp. 14-15. Moreover, the fact that more than 650 other parties were able to submit timely and

comprehensive written responses to the same Information Request indicates it was not unreasonable to expect Crown to comply. If, as Crown claims, it had little information to give to EPA, it would be all the easier for Crown to comply in a timely and complete fashion.

10. Crown's non-compliance with the Information Request continued for 630 days after October 17, 1986 until June 29, 1988.

11. Crown is subject to civil penalties of up to $25,000 per day under section 104(e)(5) of CERCLA, 42 U.S.C. ss 9604(e)(5), for each of

the 630 days of its non-compliance with the Information Request from October 17, 1986, the effective date of the amendments, until June 29, 1988, when Crown finally complied with the Information Request. Crown is subject to civil penalties of up to $15,750,000 for its non-compliance with CERCLA since October 17, 1986.

12. Because Crown is subject to civil penalties of up to $19,750,000 for its violation of RCRA and civil penalties of up to $15,750,000 for its violation of CERCLA, the total penalty which my be imposed against Crown under both statutes is

$35,500,000.

13. Determination of the amount of an appropriate civil penalty is committed to the informed discretion of a court. United States v. ITT Continental Baking Corp., 420 U.S. 223, 230 n.6 (1975); United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314, 322 (D.S.C. 1988), aff'd in part and vacated in part on other grounds, 865 F.2d 1261 (4th Cir. 9188) (per curiam); United States v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984).

14. In exercising its discretion, a

court should give effect to the major purpose of a civil penalty: deterrence. T & S Brass and Bronze Works, Inc., 681 F. Supp. at 322; Phelps Dodge Industries, 589 F. Supp. at 1358; United States v. Swingline, Inc., 371 F. Supp. 37, 47 (E.D.N.Y. 1974).

15. Civil penalties "should be large enough to hurt, and to deter anyone in the future from showing as little concern as [Crown] did for the need to [comply]." Phelps Dodge Industries, Inc., 589 F. Supp. at 1367; Swingline, 371 F. Supp. at 47.

16. The First Circuit recognized

the power to impose civil penalties was important in enforcing EPA's information gathering authority in order that EPA may be able to effectively regulate hazardous waste and hazardous substances:

> Information is knowledge and knowledge is power. By authorizing the agency to mount inspections and to collect information from persons and entities involved with hazardous residues, ss 6927 (a) [of RCRA] directly facilitates the government's ability to battle the polluters and the despoilers...Put another way, unless the civil penalty provision of RCRA is applicable to those who refuse to honor the EPA's inquisitional authority under ss 6927(a), the agency will be severely--indeed, unduly--handicapped in its attempt to

> effectuate needed regulation of the "treatment, storage, transportation and disposal of hazardous wastes which have adverse effects on health and the environment." 42 U.S.C. ss 6902(4).

Charles George Trucking Co., 821 F.2d at 689.

17. In Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988), petition for cert. filed, (1988) (No. 88-660), the Fourth Circuit upheld an award of a civil penalty of $977,000, or $1000 per day, for failure to submit to the Government pollution monitoring reports required under the Clean Water Act. Courts have imposed

significant penalties on parties who have failed to comply with information gathering provisions of environmental statutes. See also T & S Brass and Bronze Works, 681 F. Supp. at 322, (awarding $1000 per day in civil penalties for violations of RCRA); United States v. Ciampitti, 669 F. Sup. 684, 699-700 (D.N.J. 1987) (also imposing a civil penalty of $1000 per day for violating the Clean Water Act).

18. In United States v. Reader's Digest Ass'n., Inc., 662 F.2d 955, 967-68 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982), the Third

Circuit identified five factors to be considered by a court in assessing civil penalties: (1) the good or bad faith of the defendant; (2) the injury to public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the enforcing agency. Each of these factors supports a significant civil penalty in this case.

19. Crown acted in bad faith by failing to respond to the Information Request in a timely or complete manner. Mr. DiFiore did not read

the Information Request and did not start to gather documents until July 1986, two months after the response from Crown was due. Neither Mr. DiFiore nor anyone else at Crown prepared an affidavit or wrote answers to the questions in the Information Request. The only conduct by Mr. DiFiore was an incomplete search for and an untimely gathering of some documents. Mr.DiFiore sent these documents to Mr. Nuzzo in September, 1986, four months after a response was due, without including a cover letter. He did nothing further to comply.

20. Mr. Nuzzo has been Crown's corporate counsel since 1971 and meets with Crown officers on a weekly basis to discuss its legal affairs. Mr. Nuzzo was acting as Crown's agent or representative in handling the Information Request. Mr. Nuzzo read the Information Request when Crown received it in April, 1986. But when he received the package of documents from Mr. DiFiore on September 25, 1986, Mr. Nuzzo did not check the materials he received to see whether Mr. DiFiore's work compiled with the Information Request. Mr. Nuzzo did not send the documents to EPA; he

simply ignored the matter.[3] Both Mr. DiFiore and Mr. Nuzzo failed to forward the documents to EPA.

---

3 The only conclusion to be drawn is that the failure to comply was willful and in bad faith. This conclusion is strengthened by the testimony of Mr. Nuzzo who explained how Crown responded to the EPA Information Request and how it was a participant in a group formed by the PRP's in light of the EPA request. With regard to the timing and content of the Crown response, Mr. Nuzzo stated: "How urgent is this, because this is nonsense that we can't put our hands on right now." Trial Tr. at 76. This characterization of "nonsense" and the statement of "How urgent is this" are an accurate reflection of the attitude of both Crown and Mr. Nuzzo with regard to the EPA Information Request.

The content of Mr. Nuzzo's statement is reflected not only in the words used but as well as in the derision in his voice and physical expression while making the statement.

They provided neither written responses to EPA's questions nor an affidavit, as directed be provided. Mr. Nuzzo's only contact with EPA was a telephone call with Jeremy Firestone of EPA in December 1986, eight months after Crown received the Information Request. The entire effort demonstrated a failure buy Crown's representatives to take the Information Request seriously or even focus on the Information Request in a timely manner.

21. Crown is bound by the failure of its agents, Mr. DiFiore and Mr.

Nuzzo, to adequately and timely respond to the Information Request. See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-66 (1982) ("[U]nder general rules of agency law, principals are liable when their agents act with apparent authority and commit torts").

22. The facts in this case are similar to the facts in Charles George Trucking Co., supra. In Charles George, EPA had sent the defendants an information request under RCRA and CERCLA and asked for a response within 30 days. The

defendants in the Charles George case, just as Crown in this case, failed to give EPA a response during the 30 day respond period. However, unlike the conduct of the Crown representatives, after the 30 days had expired, the lawyer for the Charles George defendants contacted EPA to request an extension of time to respond. In this case, Mr Nuzzo contacted EPA seven months late to state Crown was having difficulty obtaining the documents. Although the lawyer for the Charles George defendants had promised EPA that his clients would continue to search for

information, no data or documents were submitted to EPA; the Government was forced to file a lawsuit to obtain the information and documents. Similarly, Crown submitted no information or documents to EPA following Mr. Nuzzo's telephone call, despite Mr. Nuzzo's statement that he told Mr. Firestone that he would keep looking for documents. The First Circuit found civil penalties appropriate in the Charles George case. Crown's bad faith in this case also justifies a significant civil penalty.

23. The facts in this case are also

similar to the facts in United States v. Liviola, 605 F. Supp. 96, 97-98 (N.D. Ohio 1985). In Liviola, EPA sent a request for information and documents under RCRA and CERCLA to the defendant, requesting a response within 30 days. The defendant requested an extension of time to respond, saying that documents were scattered and disorganized. EPA granted the defendant an extension of time to comply with the request but the defendant continued to fail to submit the information. When EPA asked the defendant again to comply, the defendant said he was still

working on gathering the documents. The United States finally filed suit in Liviola and the Court found the defendant subject to civil penalties. 605 F. Supp. at 99-100. As in the Charles George and Liviola cases, Crown's bad faith is evident.

24. The potential injury to the public in this case is also evident. Without responses to the information requests, EPA would not have been able to construct an accurate waste-in list and thus been able to settle with 359 defendants for the cleanup of the four Cannons sites. If others had failed to answer as Crown did,

then EPA would be unable to compile an accurate waste-in list, inhibiting EPA's ability to settle with the various PRP's. This would slow up the settlement process and may even preclude settlements. The public would be injured due to possible delays in cleaning up the four sites and to the increased use of government, rather than private funds, in the cleanups.

25. In assessing a civil penalty, a court need not find that an actual injury to the public has occurred; rather, the court need only assess the potential injury to the public.

Reader's Digest Ass'n, 662 F.2d at 969.

26. Crown has the ability to pay a significant civil penalty. According to Plaintiff's Exhibit 9, Crown has annual sales of between $11 and $12 million, and a net worth of $1.6 million. This was not contested in any way by Crown.

27. The potential benefit to Crown from failing to respond is measured both in the savings of time and money needed to respond and in the potential savings to Crown in evading liability by not providing information which may show it is

liable for the costs of cleaning up the Cannons sites.

28. The most important factor in this case supporting the imposition of a significant civil penalty is the need to support the authority of EPA in matters such as this. Without the ability to gather information and documents, EPA would be, as the First Circuit noted, "handicapped" in its ability to effectively enforce CERCLA and RCRA. Charles George Trucking, 823 F.2d at 689. A significant penalty is necessary to underscore the seriousness of the information gathering authority of EPA and to

ensure it is no ignored as it was by Crown in this case. In the Reader's Digest case, the Third Circuit quoted Divers, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1458 (1979):

> The efficacy of any regulatory program depends on the sanctions imposed in individual cases. If these sanctions are set too low, potential violators may be insufficiently motivated to minimize the social harm resulting from their behavior, or society may be under compensated for the harm that does occur.

Readers Digest Ass'n, 662 F.2d at 967 n.16. Awarding a significant civil penalty in this case will not

only deter Crown from future violations, but also deter others in the regulated community from treating EPA information requests as trivial matters, as Crown did, or as nonsense, as Mr. Nuzzo described them.

29. Crown is precluded from raising the defense of estoppel for the first time in its post-trial submission. Crown did not identify estoppel as a defense in its Answer. A defendant is required to plead the affirmative defense of estoppel with specificity in its Answer. Fed. R. Civ. P. 8(c). "Generally, the failure to plead an

affirmative defense results in the waiver of that defense and its exclusion from the case." C. Wright & A. Miller, Federal Practice and Procedure, ss 1278, at p. 339 (West 1969). In Johnson v. Rogers, 621 F.2d 300, 305 (8th Cir. 1980), the Eighth Circuit held that a defendant who failed to plead an affirmative defense could not raise it for the first time on a motion for a judgment notwithstanding the verdict. See Kane v. Heckler, 776 F.2d 1132 (3d Cir. 1985) (party may not raise an affirmative defense for the first time on appeal).

30. Crown did not raise the defense of estoppel in its response to the Government motion for summary judgment, which was granted. Finally, Crown did not identify the defense of estoppel as an issue of law in its "Pre-Trial Memorandum." Each party was required to file a comprehensive trial brief which was to "address all legal issues of any substance anticipated to arise at trial and....set forth the legal contentions which the submitting party will advance at trial." The Order further states that "[f]ailure to brief any issue...which should

have been anticipated, will be deemed a waiver of such issue." See July 18, 1988 Order (emphasis in original). Crown did not even mention the word estoppel much more brief the concept in its pretrial submission.

31. Even assuming Crown were permitted to raise the issue of estoppel for the first time in its post-trial submission, the evidence and the law do not support a finding of equitable estoppel.

32. The Supreme Court has neither recognized nor precluded equitable estoppel as a defense against the

United States. However, the Supreme Court has held that "it is well settled that the Government may not be estopped on the same terms as any other litigant." Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984).

33. The Third Circuit has held equitable estoppel may only be proved against the United States if the party claiming estoppel proves the three traditional elements of estoppel, and a fourth element of "affirmative misconduct on the part of the government." United States v. Asmar, 827 F.2d 907, 912 (3d Cir.

1987).

34. The Third Circuit has also identified the three traditional elements of estoppel which a litigant must prove as: "(1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment." Asmar, 827 F.2d at 912.

35. In this case, Crown has failed to prove the three traditional elements of estoppel, and the fourth element of affirmative misconduct by the government.

36. Crown has not shown that Mr. Firestone misrepresented any fact.

Even if Mr. Nuzzo's account of his conversation with Mr. Firestone is credited, Mr. Nuzzo did not testify Mr. Firestone had told him that Crown was in compliance with the Information Request, or that Crown did not have to submit a written response or that Crown would not be subject to civil penalties. Even accepting Mr. Nuzzo's account of the conversation, Mr. Firestone made no misrepresentation of fact; rather, he simply did not discuss these matters.

37. Moreover, Crown did not rely on any statement made by Mr. Firestone. Crown received the Information

Request, which described at length what was required to respond. Crown also received a reminder letter and the Order and Administrative Complaint. Crown was provided with written instructions as to what was required to respond to the Information Request and when a response was due. Crown was also advised by the Information Request, the reminder letter and the Order that it may be subject to civil penalties if it failed to respond. Crown had adequate written notice of its legal obligations and the possible consequences of a failure to

comply. Even if the Court were to accept Mr. Nuzzo's account of his conversation with Mr. Firestone, at no time did Mr. Firestone say that these obligations were no longer in effect or that Crown would not be subject to penalties.

38. Crown suffered no detriment because of the conversation between Mr. Nuzzo and Mr. Firestone. At the time of their December 1986 conversation, Crown had already been in violation of its obligation to respond to the Information Request for seven months. Moreover, even if the Court were to accept Mr. Nuzzo's

account of the conversation, Mr. Nuzzo testified he told Mr. Firestone that Crown would continue to look for documents. Crown itself agreed to attempt to comply, but failed to take a significant action to do so.

39. Finally, Crown can show no affirmative misconduct on behalf of the Government. At worst, all Crown can show is that Mr. Firestone did not repeat the instructions about how to respond to the Information Request, which Crown had received eight months previously, and the warning concerning civil penalties which Crown had received in the

Information Request and in the two follow-up mailings sent to Crown in August and November 1986. Mr. Firestone did not engage in misconduct of any kind.

40. As state by counsel to Crown during opening statements:

> Your Honor, it's defendant, Crown Roll Leaf's position with regard to this matter that, in fact, this is a situation where there was a defendant who admittedly failed to comply with the letter of the rule. In fact, that's not even new issue before this Court.

Trial Tr. at 8. Counsel for Crown completed his opening statements by again conceding violation of RCRA and CERCLA:

> We would submit to the Court that while, in fact, this defendant has not complied with the letter of law, that this defendant is complying and has attempted to comply with the spirit of the regulation that's at issue in this hearing.

Trial Tr. at 10.

41. This theme was carried over into the summation when counsel to Crown conceded:

> Your Honor, as I indicated in my opening statement and as I would like to conclude in summation, this is not a case about whether or not Crown did or didn't comply with the letter of the law. There is no question they did not.

Trial Tr. at 12.

42. The only issue is the

appropriateness and amount of civil penalties.

43. Crown flagrantly disregarded the Information Request from EPA. Questions from the Court to counsel of Crown underscore this conclusion.

> The Court: Why didn't [Crown] just respond to the [I]nformation [R]equest and say [Crown could not find the requested information]?
>
> Mr. Katz: That's exactly true, there is no question that didn't take place.
>
> The Court: I'm asking you why.
>
> Mr. Katz: Judge, there is no answer for that question.

Trial Tr. at 122-23.

44. Civil penalties are appropriate

in this case; the request for $100 per day penalties is neither harsh nor extreme in light of the conduct of Crown and the financial position of Crown.

45. Any Findings of Fact which should be deemed a Conclusion of Law are incorporated herein of reference.

46. Based upon the foregoing, the United States is awarded a civil penalty of $100 per day for each of the 790 days of violation of RCRA and $100 per day for each day of violation of CERCLA, for a total civil penalty of $142,000, plus costs against Crown.

SO ORDER this 28th day of April, 1989,

ALFRED J. LECHNER, JR.,
U.S.D.J.

AJL/tlh

cc: Ellen Smith, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5402

U.S.A.

v.

CROWN ROLL LEAF, INC.,
Appellant

On Appeal from the United States
District Court
For the District of New Jersey
(Newark)
(Civil Action No. 88-0831)
District Judge:
Honorable Alfred J. Lechner, Jr.

Submitted Under Third Circuit
Rule 12 (6)
September 27, 1989
BEFORE: HIGGINBOTHAM, STAPLETON, and
SCIRICA,
Circuit Judges.

JUDGMENT ORDER

After consideration of the appellant, it is -

ORDERED AND ADJUDGED that the judgment of the district court dated April 28, 1989, be and is hereby affirmed.

Costs taxed against appellant.

By the Court

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, Clerk

DATED: October 12, 1989

UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

No.

CROWN ROLL LEAF, INC.
Petitioner

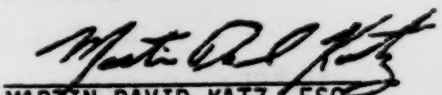
v.

UNITED STATES OF AMERICA
Respondent

PROOF OF SERVICE
RULE 28

I certify that two copies of the Petition have been served upon counsel for the Respondent by placing same in the United States mail, postage pre-paid properly addressed this day of December, 1989, to:

JACQUES B. GELIN, ESQ., U.S. DEPARTMENT OF JUSTICE, P.O. BOX 23795, L'Enfant Plaza Station, Washington, D.C. 20026



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